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No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF DANIEL R. MANDELKER AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF DANIEL R. MANDELKER AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Daniel R. Mandelker has received the parties' written consent to file this brief as amicus curiae in support of the petitioner and the letters of consent have been filed with the Clerk of the Court.[1]

PROFESSOR MANDELKER'S INTEREST ARISES FROM HIS LIFELONG CONCERN WITH THE LAND USE PROCESS AND THE ROLE OF THE COURTS IN THAT PROCESS.

Daniel R. Mandelker is the Howard A. Stamper Professor of Law at Washington University in St. Louis where he teaches land use law, state and local government, environmental and land use litigation. Professor Mandelker is one of the country's leading scholars and teachers in land use law having authored a number of well-known and frequently used treatises and text books dealing with all aspects of land use law and litigation. His stature as a leading land use scholar and teacher has been continually affirmed by his many law review articles and his role as an invited lecturer in prestigious circumstances such as the Denham Lecture at Cambridge University.

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[1] No counsel for either party authored any part of this brief. No person or entity other than the law firm of Cox, Castle & Nicholson LLP, Professor Mandelker's counsel of record, has made any monetary contribution to the preparation or submission of this brief.

In addition to his teaching at Washington University and at numerous conferences, he has made presentations to such diverse groups as the United States Congress, the Federalist Society, the National Association of Home Builders and the American Planning Association. In fact, he served as the principal consultant on the American Planning Association's recently published two volume, *Growing Smart Legislative Handbook*.[2]

Professor Mandelker has no political axe to grind; his presentation to this Court is designed only to assist it in determining whether the issue presented by Franklin Kottschade's petition for certiorari is sufficiently important to justify the allocation of this Court's time to the issue.

SUMMARY OF THE ARGUMENT

The application by the lower federal courts of the Court's state compensation requirement, set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), has made landowners asserting that their land has been taken – thereby entitling them to the federal Constitution's mandate of just compensation – second class citizens in that they, almost alone, are barred access to the federal

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[2] Professor Mandelker's biography may be found at http://law.wustl.edu\landuselaw\biography.html.

courts, a result which is justified by neither this Court's past opinions nor logic.

Further, the lower federal courts are split as to whether a mechanism exists allowing federal takings claims to be tried in federal courts after exhausting state compensation procedures.

This Court's grant of certiorari is needed to make clear just what *Williamson County* requires and allows.

ARGUMENT

I. THE APPROACH PRESENTLY BEING TAKEN BY THE LOWER COURTS DEPRIVES LANDOWNERS, WHO CLAIM A TAKING HAS OCCURRED, RIGHTS ROUTINELY GRANTED TO EVERY OTHER CITIZEN OF THE UNITED STATES

This Court held in *Williamson County* that a landowner must exhaust compensation remedies under state law before litigating his or her federal constitutional claims in federal court. (473 U.S. at 194-195.) Nothing in the Court's language in *Williamson County* indicated any desire on behalf of the Court to permanently debar a landowner from having a federal court consider claims that his or her land had been taken through governmental action. In fact, precisely because a constitutional violation is being

asserted, a federal court is at least as qualified as a state court to decide when the Fifth Amendment, made applicable to the states and, in the land use context, municipalities within a state, by the Fourteenth Amendment, have been violated. Indeed, a federal court is better able to make that decision where a citizen asserts solely federal claims.

One example – and it is only one out of many – of the problems that landowners face because of the lower federal courts' interpretation of the Court's rule in *Williamson County* is shown by the travail suffered by the landowner in *Santa Fe Village Venture v. City of Albuquerque*, 914 F.Supp. 478 (D.N.M. 1995). In that case, Albuquerque's City Council established a building moratorium to preclude any development on lands near a national monument site. The landowner had an option to purchase land within the area subject to the moratorium but never exercised that option because of the total land use restriction. Instead, it filed a lawsuit in federal district court seeking just compensation from Albuquerque on the theory that its inability to develop its property had resulted in a compensable taking. The district court dismissed the suit on ripeness grounds because the landowner had never sought compensation using a state court remedy. In other words, the district court held that exhausting the state compensation procedure was necessary in order to ripen the federal claim for resolution. The landowner then filed a second action for inverse condemnation in state court without raising any federal claims. However, the state court dismissed the complaint for lack of standing. After

exhausting state court proceedings, the landowner then filed a third suit, this time in federal court, under 42 U.S.C. § 1983 alleging only the deprivation of its federal rights, including takings, due process and equal protection. The district court responded by dismissing the federal action as again unripe, this time because the federal claims had not been raised in the state court proceedings even though the state court had already decided that the landowner lacked standing to bring its action there.

The *Santa Fe Village Venture* case is reflective of the unfortunately too often stated position of the lower federal courts that land use questions – and particularly takings claims – do not belong in federal court. See, *e.g.*, *Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 596 (3d Cir. 1998) ("We decline to federalize routine land-use decisions. Rather the validity of land-use decisions by local agencies ordinarily should be decided under state law in state courts."); *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir.), *cert. denied*, 528 U.S. 923 (1998) (Court of Appeals is not created to be "a Grand Mufti of local zoning boards ..."); *Boatman v. Town of Oakland*, 76 F.3d 341, 342 (11th Cir. 1996) ("The dispute in this [land use] case is not grist for the mill of a United States District Court; rather it belongs in the state court."); and *Polenze v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989) (federal courts "are not zoning boards of appeal."). Indeed the Seventh Circuit has gone so far as to demonstrate bemusement as to why any landowner would ever sue in the federal courts of the Seventh

Circuit because no landowner has ever won there. *River Park, Inc. v. City of Highland Park,*, 23 F.3d 164, 165 (7th Cir. 1994).

This dislike of land use cases is distinctly different from this Court's attitude which has been reviewing land use cases – in the takings context – for over a century. See, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1897), *Pennsylvania Coal Co. v.* Mahon, 260 U.S. 393 (1922), *Penn Central Transportation Co. v. City of New* York, 438 U.S. 104 (1978), *First English Evangelical Lutheran Church v. County of Los* Angeles, 482 U.S. 304 (1987), *Suitum v. Tahoe Regional Planning* Agency, 520 U.S. 725 (1997), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning* Agency, 535 U.S. 302 (2002).

If land use cases are worthy of this Court's time and attention, they should be just as worthy of the time and attention of the lower federal courts.

The lower federal courts' position is also distinctly different than that illustrated by this Court in numerous other situations involving the application of various portions of the Bill of Rights. For instance:

- Whether an artistic or literary work is obscene under the First Amendment is determined by "contemporary community standards" and definitions under "applicable state law." *Miller v. California*, 413 U.S. 15, 24 (1973)

- Local land use ordinances governing the location of "adult" uses are routinely reviewed by the federal courts to determine if they pass muster under the First Amendment. See, *e.g.*, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); and *Young v. American Mini Theaters*, 427 U.S. 50 (1976). For a more detailed discussion of federal cases involving the regulation of "adult" uses, see Mandelker, *Land Use Law*, §§ 5.58-.66 (5th ed. 2003) ("Mandelker").

- At the other end of the spectrum, federal courts have routinely looked at local land use regulation in the context of religious uses to see whether the local action violates the religious freedoms portion of the First Amendment. See, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). A more detailed discussion of federal cases involving the land use control of religious uses may be found in Mandelker, §§ 5.67-.70.

- Federal courts have not shied away from issues having to do with local land use control of advertising to determine whether limitations violate the protection of the First Amendment. See, *e.g.*, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S.

789 (1984), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). For a more detailed discussion of land use controls involving signs and billboards, see Mandelker, §§ 11.06-23.

Suffice it to say that, in none of these areas – all of which involve restrictions imposed by local land use laws – has the Court required the landowner to first seek relief using state procedures. Quite simply, there is no principled reason why the protection provided by the Fifth and Fourteenth Amendments should place an almost insuperable hurdle in the path of a landowner who claims that his or her land has been taken.

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation ..." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

II. THE APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL – CLAIM AND ISSUE PRECLUSION – MAY, OR MAY NOT, HAVE MADE IT IMPOSSIBLE TO EVER HAVE A FEDERAL COURT DETERMINE WHETHER A TAKING HAS OCCURRED

Under the abstention doctrine, a federal court may abstain from deciding federal constitutional issues

until after the federal court plaintiff has had his or her state law issues decided in a state court. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). In order to return to the federal court for a resolution of the federal issues without either res judicata (claim preclusion) or collateral estoppel (issue preclusion) applying, the plaintiff must file an explicit reservation informing the state court of his or her federal claims and of his or her intent to return to federal court and thereafter limit the issues to those of state law. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). This Court emphasized the importance of the facts involved in the context of the federal claim when it explained why review by this Court was inadequate and why the plaintiff had a right to have a federal court determine the facts.

> "Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." *England, supra,* 375 U.S. at 416.

England involved the situation where a case was initially filed in a federal court. However, the Eleventh Circuit held that the unique circumstances presented by this Court's decision in *Williamson County* made the procedure set forth in *England* applicable to takings claims first filed in a state court. *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) (res judicata and collateral estoppel applied where a plaintiff asserting a takings claim in state court had

failed to make an explicit reservation of his right to federal review of his takings claim). *Fields* is still good law in the Eleventh Circuit. See, *Saboff v. St. John's River Water Management Dist.*, 200 F.3d 1356, 1359-1360 (11th Cir. 2000).

The Fourth Circuit has endorsed the Eleventh Circuit's procedure. *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

The Third Circuit, on the other hand, has held that a reservation of a federally based takings claim for review in a federal court in an action originally filed in a state court is ineffective because *England*, and the procedure authorized by the Eleventh Circuit in reliance on *England*, has no relevance in a situation where a takings claim is first commenced in state court. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 n.3 (3d Cir. 1989).

The Ninth Circuit has, in a Solomon-like manner, split the baby down the middle. It has specifically held that an *England*-type reservation may be made in takings cases filed in a state court which will preserve the right to a federal action notwithstanding the doctrine of res judicata, *Montclair Parkowners Association v. City of Montclair*, 264 F.3d 829, 831 n.1 (9th Cir. 2001), while also holding that collateral estoppel – issue preclusion – bars relitigation of a takings claim in the federal courts. *Dodd v. Hood River County*, 136 F.3d

1219, 1227-1228 (9th Cir.), *cert denied*, 528 U.S. 923 (1998).

Aside from the simple unfairness of effectively depriving a landowner who claims the protection of the Fifth and Fourteenth Amendments by asserting a takings claim of the right have a federal court decide if a taking has occurred, the difference in the way in which the various Circuits have approached the problem requires the Court's resolution.

III. CONCLUSION

A quick glance at Shepard's *United States Citations* shows the success as a docket clearing mechanism of *Williamson County*'s requirement that a landowner asserting a takings claim first make use of state procedures. The almost automatic dismissal of takings claims filed initially in federal courts, because of their interpretation of the state compensation procedure, is contrary to the general rule, repeatedly expressed by this Court, that a refusal to exercise jurisdiction "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959), quoted in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

If the lower federal courts have misinterpreted this Court's holding in *Williamson County*, then this is the time to set them straight.

Even when this Court has specifically adopted a rule of procedure, it has not been afraid to reverse itself when it realizes that its original determination was incorrect. Compare *Erie RR v. Tompkins*, 304 U.S. 64 (1938), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

On the other hand, if the lower federal courts are proceeding precisely as this Court intended, then it is time for this Court to realize that it made an error in 1985 and that now is the time to correct that error.

Accordingly, Professor Mandelker respectfully requests that the Court grant Mr. Kottschade's petition for writ of certiorari.

DATED: July 21, 2003 Respectfully submitted,

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